IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

TUESDAY, THE 10TH APRIL 2007 / 20TH CHAITHRA 1929

CRL.A.No. 568 of 2006(C)

SC.401/2004 of ADDL. SESSIONS COURT (ADHOC), THRISSUR
CP.13/2002 of JUDL.MAGISTRATE OF FIRST CLASS COURT, TIRUR
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APPELLANTS: ACCUSED NOS. 1 AND 2
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1. ABDUL SALAM, S/O.MOIDEENKUTTY,
PAININGAL HOUSE, ALATHIYUR, THANNILLAKKARA DESOM.

2. ABOOBACKER SIDHIQUE, S/O.MOIDEENKUTTY,
PAININGAL HOUSE, ALATHIYUR,
THANNILLAKKARA DESOM.

BY ADV. SRI.SUNNY MATHEW

RESPONDENT: COMPLAINANT

STATE OF KERALA THROUGH THE
CIRCLE INSPECTOR OF POLICE, TIRUR, REPRESENTED
BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY ADV. PUBLIC PROSECUTOR K.C.SANTHOSH KUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 23/03/2007, THE COURT ON 10/04/2007 DELIVERED THE FOLLOWING:

J.B.KOSHY & T.R.RAMACHANDRAN NAIR, JJ.

Crl.A.No.568 OF 2006

Dated April,2007

JUDGMENT

Koshy,J.

The appellants were convicted for the offences punishable under Sections 324, 323 and Section 302 read with Section 34 of the Indian Penal Code. Prosecution case is summarised by the Sessions Judge correctly. It is as follows:

> "PW1 along with her family consisting of her husband, two daughters and one son, had been residing in the house by name Jose Cottage situated at Ambalapadi at Alathiyur in Thriprangode Amsom. PW1 was working as a teacher in K.H.M.H.S. High School at Alathiyur, and her husband Francis was working as headmaster of A.M.L.P. School at Pulluni near Alathiyur. On the morning of 26.06.2001, while Francis along with his wife PW1 and younger daughter PW2 aged 12 years, was going to their schools they reached the road at Ambalapadi, and at that time the accused persons who were the neighbours of Francis, were found standing on the road. While Francis was proceeding in the direction of his school pushing his bicycle, both the accused persons moved behind him. When Francis reached the road lying in front of the building of Kunhimu, W/o.Farook Haji, situated at Ambalapadi at Alathiyur at 9.45 a.m., PW1 along with PW2 apprehending danger, moved speedily and they reached in front of the accused persons. Then the accused persons restrained PW1, and the first accused slapped her neck. The second accused kicked her buttocks. The first accused with the intention of causing the death of Francis,

> stabbed him in the chest and left hand with a knife. The first accused also stabbed PW2 in her chest with the same weapon, who tried to prevent the accused persons from attacking her father. The first accused again stabbed Francis in the chest. Francis and the first accused struggled together for taking the possession of the knife. At that time, the second accused took the possession of the knife and he dealt a blow with the knife aiming at Francis. As Francis turned aside the blow with the knife was landed on the first accused. Francis collapsed in the place of occurrence. Thereat, the second accused delivered blow on Francis with a cycle chain. The accused persons inflicted bodily injuries to Francis which were sufficient in the ordinary course of nature to cause his death, and they also caused hurt to PWs 1 and 2. After the incident, Francis and PW2 were taken to Government Hospital at Tirur. On arrival at the hospital, Francis was pronounced dead. PW2 was admitted to the said hospital."

PW1, who is the wife of the deceased, an occurrence witness and got injuries in the same incident, gave Ext.P1 F.I. Statement. Incident occurred at about 9.45 a.m. and deceased was taken to the hospital and on intimation from the hospital, PW11 who was working as ASI at Tirur Police Station reached the hospital at 10.15 a.m. and recorded the F.I. Statement at 10.30 a.m. on the same day and the F.I. Statement reached the Magistrate's Court on the same day. There is no delay in giving F.I. Statement and grief sticken widow who lost his husband, a headmaster, gave the same and there is no time for any concoction. Her

deposition before the court is in tune with the prosecution case as stated above. As motive, she stated that accused who are close neighbours blocked their way to the house. Therefore, her deceased husband filed a case against father of the accused. On another day when they were not in the house, accused poured kerosene in their well and they filed complaint before the police. She also stated that first accused and his father attacked her and two daughters on 6.2.2001 and her husband was assaulted on 14.3.2001. Cases were registered in both these incidents. Exts.D1 to D3 judgments of criminal court produced on the side of the accused also shows that there were such cases and for want of conclusive evidence they were acquitted. Therefore, motive is proved.

2. PW1 deposed exactly in terms of the prosecution case as summarized the by the Sessions Judge. PW2 is the daughter of the deceased. She was also injured in the incident. She also deposed in terms of the prosecution case. PW1 deposed that she is hailing from Marthandam and during the relevant time she and her family were residing at Jose Cottage at Ambalapadi at Alathiyur near Tirur. She had been working as a teacher in K.H.M.H.S. High School at Alathiyur and her husband Francis had been working as Headmaster of A.M.L.P. School at Pulluni. Their schools

are within walking distance of their house. PWs 1 and 2 deposed that the incident involved in this case took place on the road lying in front of the building belonging to Kunhimu, wife of Farook Haji, situated at Ambalapadi at 9.45 a.m. on 26.06.2001. Deceased Francis along with PWs 1 and 2 were proceeding to their schools from their house and when Francis proceeded to the way to his school, they saw the accused persons who were their neighbours, standing on the road. Deceased Francis continued moving in the direction of his school pushing his bicycle. The accused persons went after deceased Francis. So PWs 1 and 2 moved on towards Francis. The accused persons asked Francis to stop there. So PWs 1 and 2 moved speedily towards the accused persons and they reached in front of the accused persons. PW1 has deposed that both the accused persons restrained her and the first accused beat her on the back of the chest with the hand, and then she felt pain. PW2 has deposed that the first accused slapped the neck of PW1 and the second accused kicked the buttocks of PW1. So, according to PW1, she felt pain and she fell down. PWs 1 and 2 have again deposed that the first accused took out a knife from his waist and he stabbed Francis in the chest and left hand, above the elbow. When PW2 tried to prevent the first accused from stabbing her father, the first accused stabbed PW2 in her chest with the knife. The first

accused again stabbed Francis in the chest with the same weapon. The first accused and Francis struggled for taking the possession of the knife. In that scuffle, Francis sustained injury to his hand. The second accused took possession of the knife and stabbed Francis. As Francis turned aside the said blow with the knife was landed on the first accused and the first accused sustained stab injury. Francis collapsed in the place of occurrence. At that time, the second accused drew out a cycle chain from his waist and he delivered blows on Francis with the cycle chain. Thereafter, both the accused persons went away from the place of occurrence in an autorickshaw. Francis and PW2 were taken by PW1, PW5 and others to the Government Hospital, Tirur, in a jeep. PW1 further deposed that on arrival at the hospital, Francis was examined by the doctor and pronounced him dead. PW2 deposed that she was admitted at Government hospital, Tirur and discharged from there on 27.6.2001. Thereafter she came to the native place at Marthandam and she was admitted in the Government Hospital, Parassala. PW2 was only aged 12 at the time of the incident. PWs 1 and 2 identified MO1 knife and MO2 cycle chain used by the accused persons 1 and 2 respectively. MO24 is the sheath of MO1. Mos 3 to15, 17 to 20 belonged to deceased Francis. Mos 16 and 23 belonged to PW2. They have also identified Mos 21 and 22

as those of the shirts worn by the accused persons. MOs 3 to 15 are the items, namely, cycle, bag, spectacles case, spectacles, the packet (containing 5 one rupee coins and 1 fifty paise coin), 3 ball pens, diary, umbrella, tiffin box and chappals, all belonged to deceased Francis, which were taken into custody from the place of occurrence as per Ext.P8. MO16 is the umbrella of PW2 which was also taken into custody as per Ext.P8. MO17 gold ring, MO18 gold chain, MO19 wrist watch and MO20 shirt worn by deceased Francis, were taken into custody as per Ext.P7 inquest report. MO21 hirt and MO22 shirt which were produced by the second accused, were taken into custody as per Ext.P13. MO23 Churithar top produced by PW1 was taken into custody as per Ext.P14. MO24 sheath of MO1 and Mos 25 and 26 chappals of PW1 were taken into custody from the place of occurrence as per Ext.P8. MO27 pants, MO28 towel, MO29 torn underwear and MO30 belt worn by the deceased Francis, were taken into custody as per Ext.P7. MOs 31 and 32 chappals, MO33 blood-stained soil contained in a packet and MO34 filter paper soaked in the blood,were also taken into custody as per Ext.P8.

3. PW3 is the doctor who examined the accused, deceased, PW1 and PW2 when they were brought to the Government Hospital, Tirur. Ext.P2 is the wound

certificate in respect of PW2. It shows that on 26.06.2001 at 10 a.m., he examined PW2 aged 12 and issued Ext.P2 wound certificate noting the following injury:

> "A stab injury of 2.5 cm length with sharp edge with tapering ends with 0.3 cms depth at the sternum at the upper part placed vertically."

The alleged cause stated to him is that PW2 was stabbed by a person named Salam (A1) with a knife at Ambalapadi at 9.45 a.m. According to PW3, his opinion as to the cause of injury, may be as alleged. He has also deposed that the above injury could be caused with the knife (MO1) shown to him. Ext.P3 is the wound certificate issued in respect of deceased. It shows that the deceased sustained four stab injuries and a linear injury of 20 cm length placed left side chest placed horizontally 10 cm below the left nipple. According to PW3, stab injuries could be caused by MO1 knife whereas linear injury stated above could be caused with MO1 while scuffling with others. Ext.P4 is the wound certificate in respect of first accused which shows the following injuries:

> "1. Spindle shaped injury of 3 cm length with tapering ends, margin sharp with depth 1 cm placed vertically on the left side back of the chest, 5 cm

lateral to back bone at the level of angle of scapula, and

2. A spindle shaped injury of 5 cm length with tapering ends sharp edge with 3 cm depth placed vertically 5 cm lateral to the back bone at the level of 5th thorasic vertebra."

The alleged cause stated to him is that the said person was stabbed by Francis Master with a knife at Ambalapadi at 9.45 a.m. on the said day. According to PW3, his opinion as to the alleged cause, may be as alleged. The doctor also deposed that these injuries also could be caused with MO1. PW3 doctor also examined the second accused and issued Ext.P5 wound certificate. It shows that there was no external injury, but, patient complained of pain on the right side of neck and back of the chest. The alleged cause stated to him is that the said person was beaten by Francis with a cycle chain at Ambalapadi at 9,45 a.m. on the said date. According to PW3, if a person was beaten with a cycle chain there would be wavy irregular marks.

4. PWs 4 and 5 were declared hostile. But, PW5 deposed that his house is situated at Alathiyur. Francis died at 9.25 a.m. on 26.06.2001. At that time, he was engaged in dehusking coconuts in the house of Farook Haji. He heard a cry and so he came to the road running. He saw

Francis lying in a pool of blood on the road, 20-25 metres away from the house of Farook Haji. He saw the first accused getting into an autorickshaw which was parked on the said road. The second accused was in the said autorickshaw. PW5 and others took Francis in a jeep. He was declared hostile as he stated that he did not see the actual stabbing, but, in cross examination by prosecution he deposed that he stated to the police that blood was found all over the shirt of A1 & A2 also reached from the vicinity of the tea shop of PW7 and went in an autorickshaw.

5. PW13 doctor conducted postmortem examination and issued Ext.P17 certificate in which the following injuries were noted:

> "1. Incised penetrating wound 6 x 1.5 cm oblique on front of left chest, upper outer sharp cut end 3.5 cm below collar bone. Lower inner rounded end 5 cm away from midline. The wound entered chest cavity by cutting the muscles below 3rd rib and 3rd rib margin, cut the covering of heart and entered the heart (right ventricle). Left chest cavity contained 500 ml of blood. Left lung collapsed. The depth for which tissues cut was 4 cm and the wound was directed slightly downwards and to right.
>
> 2. Incised wound 14 x 0.4 cm x 0.2 cm transverse on front of left chest extending to left side, 7 cm below

nipple 8 cm away from midline.

3. Incised wound 2.2 x 0.5 x 0.5 cm oblique on outer aspect of left chest, upper front end 10 cm below arm pit.

4. Contused abrasion 2.5 x 1.5 cm transverse, on front of left upper arm 7 cm below shoulder.

5. Incised wound 8 x 2 x 1.5 cm oblique, on back of left upper arm, lower outer end 9cm above elbow, the muscles underneath were cut.

6. Incised wound 2.2 x 1 x 1 cm, 2 cm above the upper border of middle of injury No.5 in line with it.

7. Linear superficial incised wound 11 cm long on front of left forearm oblique, extending to outer aspect, upper outer end 6 cm below elbow.

8. Superficial incised wound 3.5 x 0.2 cm transverse on outer aspect of left forearm 7 cm above wrist at the lower end of injury No.7.

9. Incised wound 5.5 x 1 x 2.5 cm vertical front of left palm at the root of thumb.

10. Superficial linear incised wound 8 cm, vertical on from of left palm, 2 cm outer to midline 1 cm below wrist.

11. Incised wound 2.5 x 0.5 x 1 cm transverse on front of right thigh 2 cm above knee.

12. Abrasion 10 x 1-1.5 cm, transverse on back of left shoulder, 5 cm away from midline 11 cm below shoulder with gaps of 0.5 cm broad each 1 cm apart and with wavy irregular margins.”

PW13 deposed that his opinion as to cause of death is that the deceased died due to incised stab injury to chest (injury No.1 in Ext.P17) He also deposed that injury Nos.1,2,3,5,6,9 and 11 in Ext.P17 could be caused with MO1 knife shown to him, that injury Nos.5 to 10 could be caused while scuffling with another person and injury No.12 could be caused with MO2 cycle chain shown to him. He further deposed that injury No.1 is sufficient in the ordinary court of nature to cause death. His deposition was not at all shaken by cross examination.

6. PW12 Circle Inspector of Police was the the Investigating Officer. According to him, he prepared Ext.P7 inquest report as per which he took Mos 17 to 20 and 27 to 30 into custody. He took Mos 3 to 16, 24 to 26 and 31 to 34 into custody from the place of occurrence as per Ext.P8. On 28.6.2001, PW12 arrested the second accused who produced two shirts (Mos 21 and 22) smeared with blood, which were taken into custody by PW12 as per Ext.P13 mahazar. The second accused was interrogated by PW12, and then he stated that the knife and cycle chain were put on the terrace of the quarters belonging to Farook Haji. Ext.P9(a) is the aforesaid information received from the second accused. In consequence of Ext.P9(a) information MO1 knife and MO2 cycle chain which were found placed on

the terrace of the said building into custody as per Ext.P9 mahazar in the presence of the witnesses. PW8 is one of the attesting witnesses to seizure mahazar who admitted the signature in Ext.P9.

7. Now we will come to the defence of the accused. A1 in his 313 statement submitted that incident occurred as mentioned in Ext.D4 private complaint. A2 submitted that the incident occurred as stated by A1. Ext.D4 is a private complaint wherein PW1 and PW2 are accused. However, averments in Ext.D4 complaint is baseless as discussed in detail in paragraphs 31 to 33 of the judgment. Since we agree with the same we are not reiterating it again. DW1 is a doctor who treated the accused in the Medical College Hospital. Ext.D10 is the case sheet proved by DW2. It shows the following injuries:

> "1. Sutured wound back of left side of chest 4 cm long.
>
> 2. Non-sutured wound 2 x 4 cm inter scapular area reaching up to the spine."

X-ray of the chest showed fracture of supraspinous process. DW1 has further deposed that the final diagnisis is that stab injury interscapular area fracture. In cross

examination, DW1 has deposed that he cannot say whether Injury No.1 is grievous or not as the measurements are ot noted, that a wound on the back of the chest could be produced by fall on stone or sharp projecting object, that the injuries were not on vital parts, and that injury No.2 could be caused with MO1 knife shown to him. According to DW1, the injury caused by an axe will normally be wedge shaped one and both the above injuries were not fatal. In Ext.D10, it is recorded that the alleged complaint is `assault by axe' whereas in Ext.P4 wound certificate complaint was that `stabbing by a knife'. Evidence of DW2, wife of A2, is of no help to the accused. The evidence as a whole would prove that while deceased was going to school, A1 & A2 attacked the deceased. Even though PWs1 and 2 tried to prevent them from going near the deceased, they were assaulted and further attack was done. The material objects recovered show that PW1, PW2 and deceased were not carried any arms. Text Books, Note Books, Tiffin Box, Umbrella etc. were carried by them. Therefore, trial Judge found that it is a planned attack by the accused on deceased and PWs 1 and 2 due to prior enmity.

8. According to the learned counsel for the appellants, in Ext.P1, PW1 only stated that the injury on

A1 was caused by A2 after taking away the knife from A1. F.I. Statement is not an encyclopedia of event. It was given by a grief sticken widow immediately after the incident. In the box she explained that A2 snatched the knife from A1 and tried to inflict a stab injury on deceased, but, since deceased moved away, it fell on A1. It is argued that injury on A1 was suppressed. We see no justification for such an argument. In Ext.P1 and deposition of PW4 it was mentioned and how injury was inflicted was also narrated. Ext.P4 was produced by prosecution and proved by PW3. There is no suppression of injuries. Evidence of PW3 supports the view that injuries were caused to A1 also by a knife like MO1, but, not even a suggestion was asked to him whether it can be caused by an axe as suggested in Ext.D10.

9. It was argued that PWs 1 and 2 were relatives. But, there is no law that evidence of relatives cannot be believed. Here, PW1 is the wife of the deceased. Involvement of the accused in the crime is clear from the defence evidence itself. When her husband was murdered in broad day light, she will not falsely proceed with registration of crime against A1 or A2 giving a chance to the real accused to escape. PW2 is a student aged 12 years at the time of the incident. She was inflicted with a stab

injury. She is an injured witness. Their evidence was not shattered in cross examination. When evidence of PW1 and PW2 are credible, there is no necessity to examine more number of witnesses as evidence is to be measured by quality and not to be weighed by quantity. Their evidence is supported by PW5 and by medical evidence. Argument made by the counsel for getting the benefit of private defence also cannot be accepted as it is clear from the evidence that A1 and A2 attacked unarmed deceased while he was going to school where he was working as Headmaster. Accused were the aggressors and they attacked the deceased to wreck the vengeance. Injury sustained by A1 in the scuffle following the stab injury on PW2 and deceased cannot justify plea of self defence.

10. Finally, it was argued that A2 may be exempted as he has no motive and he came from Gujarat to see his wife. But, earlier allegation was that attack was made by father of A1 and A2 and it is the case that A1 & A2 together came with MO1 & MO2 respectively and attacked the deceased. Further evidence shows that A2 has attacked deceased with cycle chain after stab injury caused by A1 and on his attempt to stab the deceased, it accidentally fell on A1. He also assaulted PW1. Section 34 provides constructive liability. In furtherance of common intention,

if several injuries were inflicted by two accused, it is immaterial that by whose hand fatal injuries were inflicted as held by the Supreme Court in **Dashrath Singh and others** v. **The State of Madhya Pradesh** (1977 SC 1084). In this case, prosecution was able to prove that there was participation by the two accused in committing the crime in furtherance of common intention. A1 & A2 who are brothers committed the crime with pre-arranged plan. In the above circumstances, we fully agree with the learned Sessions Judge and we see no ground to interfere with the conviction and sentence imposed on the appellants.

The appeal is dismissed.

J.B.KOSHY
JUDGE

T.R.RAMACHANDRAN NAIR
JUDGE

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